whether the addition of the third track is an interruption of the user. The test is whether the old user is radically different from, or whether it is merely a divisible fraction of, the new. *A. B. N. Co.* v. *N. Y. El. R. R. Co.*, 129 N. Y. 252. Thus the deepening and enlarging of a drain is an interruption. *Cotton* v. *Pocasset Mfg. Co.*, 54 Mass. 429. But a mere increase in the amount of drainage is not. *Shaughnessey* v. *Leary*, 162 Mass. 108. Where an elevated cable road is changed into an electric road, and the supports are moved and strengthened, there is properly held to be an interruption in the user. *A. B. N. Co.* v. *N. Y. El. R. R. Co.*, *supra*. But in the principal case the old user remains a distinct and divisible part of the new. Therefore it would seem that the court is wrong in holding that the defendant acquired no prescriptive right to maintain the two tracks.

ELECTIONS — CONSTITUTIONALITY OF PRIMARY ELECTION ACTS. — An act provided that a political party which polled over ten per cent of the votes cast at the last preceding election might have primary elections at public expense to elect delegates to the state nominating convention or to choose party candidates for election. *Held*, that the act is constitutional. *State* v. *Felton*, 84 N. E. 85 (Oh.). See NOTES, p. 622.

EQUITABLE CONVERSION — WHETHER SURPLUS PROCEEDS OF SALE OF LAND BY COURT DESCENDS AS REALTY OR PERSONALTY. — On A's death B became entitled to certain land. This land was subsequently sold by order of the court for the payment of the costs of settling the estate. After the sale B died intestate. *Held*, that the surplus resulting from the sale goes to B's heirs. *Burgess* v. *Booth*, 124 L. T. 503 (Eng., Ch. D., March, 1908).

When an intestate's land is sold for a particular purpose, the surplus undoubtedly goes to the heir. *Dixon* v. *Dawson*, 2 Sim. & St. 327. If the heir dies before the sale, the land of course, descends to his heir, who should also be entitled to the surplus. See 18 HARV. L. REV. 1, 4. But if the heir dies after the sale, the surplus, by the weight of authority, goes to his personal representative, since, the deceased not being the owner of realty at the time of his death, there is nothing to descend to the heir. *Graham* v. *Dickinson*, 3 Barb. (N. Y.) 169. The same principles, of course, apply when the title to the land passes by will. The present case relies upon a holding that a surplus from a mortgage foreclosure during the life of the mortgagor goes to his heir. *Scott* v. *Scott*, 9 L. R. Ir. 367. But by the better view the same distinction should be made in such cases. Thus it has been held that whether the heir or personal representative takes the surplus depends upon whether the mortgagor died before or after the foreclosure. *Wright* v. *Rose*, 2 Sim. & St. 323; see 18 HARV. L. REV. 1, 7. The present case therefore seems unsound on principle, and, further, there is direct English authority opposed to its conclusion. *Smith* v. *Claxton*, 4 Madd. 484.

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — WAIVER OF JURISDICTIONAL DEFECT. — The plaintiff sued the defendant in a court of a state in which neither was a resident. The defendant had the case removed to the United States circuit court on the ground of diversity of citizenship. There the plaintiff filed an amended petition. After several continuances entered into by both parties, the plaintiff moved to remand the case to the state court on the ground that neither party was a resident of the district. *Held*, that the plaintiff, by recognizing the jurisdiction of the court, waived objection thereto. *In re Moore*, U. S. Sup. Ct., April 20, 1908.

The constitutional requirement of diversity of citizenship as a ground of federal jurisdiction cannot be waived by the parties, and the court may of its own motion remand a case for want of jurisdiction. *Great Southern, etc., Co.* v. *Jones*, 177 U. S. 449. On the other hand it is well settled that the statutory requirement that a suit, originally instituted in a federal court and properly within federal jurisdiction, must be brought in the district of the residence of one of the parties, confers a personal privilege which may be waived. *Central Trust Co.* v. *McGeorge*, 151 U. S. 129. The similar requirement in case of the

removal of a suit from a state court to a federal court seems properly construed in the present case in the same way. A rather ambiguous dictum in a recent Supreme Court decision implied that under these facts jurisdiction could not be obtained by a circuit court even by consent of the parties. *In re Wisner*, 203 U. S. 449. Accordingly the decisions of several of the lower federal courts have reached that result. See *Yellow Aster, etc., Co.* v. *Crane Co.*, 150 Fed. 580. The dictum, however, was not universally accepted. *Proctor Coal Co.* v. *U. S. Fidelity, etc., Co.*, 158 Fed. 211.

HUSBAND AND WIFE — LIABILITIES OF HUSBAND AS TO THIRD PARTIES — EFFECT OF MARRIED WOMEN'S PROPERTY ACTS ON HUSBAND'S LIABILITY FOR TORTS OF WIFE. — A former act provided that in actions of tort against a husband and a wife for the tort of the wife, execution should first be levied on the lands of the wife. A later statute repealed this act, and provided that a wife might sue and be sued in all matters as if she were *sole*. *Held*, that this statute abolishes by implication the common law liability of the husband for the torts of his wife. *Schuler* v. *Henry*, 94 Pac. 360 (Colo., Sup. Ct.).

At common law a wife was liable for her torts. *Hall* v. *White*, 27 Conn. 488. But, as she was not *sui juris*, it was necessary to join her husband in order to have a proper party defendant. *Capel* v. *Powell*, 17 C. B. (N. S.) 744. Once joined, the law did not consider it unfair, in view of his control over the person and property of his wife, to subject his property to execution. BACON, ABR., *Baron & Feme, F.* Also, since a debtor's person could be taken on execution, a judgment against the wife as a *feme sole* so endangered the husband's legal right to her society without hearing him in defense, that he could bring error. *Haydon* v. *Miller*, 2 Rolle 53; *Hayward* v. *Williams*, Style 254, 280. But, since his liability arose only from the wife's legal disability, it ceased on her death. Previous statutes had abolished the husband's right over his wife's person and property and the right to take a debtor's person on execution. The present statute, by abolishing the last relics of the wife's disability, removed the necessity which caused the husband's liability. Though married women's property acts vary greatly and the decisions under them are consequently in great conflict, the modern tendency of the law as to married women seems to favor this result. *Martin* v. *Robson*, 65 Ill. 129.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — LIABILITY OF SEPARATE ESTATE ON CONTRACT OF SURETYSHIP. — A statute provided that married women might contract with reference to their legal separate property as if unmarried. The defendant, a married woman, signed a note as surety. *Held*, that she is not liable. *Bank of Commerce* v. *Baldwin*, 93 Pac 504 (Idaho). See NOTES, p. 619.

INSANE PERSONS — CONVEYANCES — HOW AVOIDED. — In an action of ejectment the defendants claimed title under a deed from the plaintiffs' ancestor to a *bona fide* purchaser. The plaintiffs offered evidence to show that the grantor was insane when he made the deed. The evidence was excluded on the ground that such deed can only be avoided in equity. *Held*, that the exclusion of this evidence was error. *Smith* v. *Ryan*, 191 N. Y. 452.

For a criticism of the decision in the lower court, see 20 HARV. L. REV. 419.

INSURANCE — AMOUNT OF RECOVERY — DESTRUCTION BY FIRE OF BUILDING CONDEMNED AS A NUISANCE. — The defendant corporation insured the plaintiff's building knowing, through its agent, that the city authorities had condemned the building as a nuisance. The authorities were on the point of tearing it down, when it was destroyed by fire. *Held*, that the plaintiff may recover full damages. *Irvin* v. *Westchester Fire Ins. Co.*, 109 N. Y. Supp. 612 (Sup. Ct.).

The court rightly found that the plaintiff had an insurable interest in the condemned building; for any interest in property the loss of which will occasion a pecuniary injury to the insured may be the subject of an insurance contract. *Riggs* v. *Commercial Mut. Ins. Co.*, 125 N. Y. 7. But the question is sug-